Supreme Court, U.S.
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No. 85-193

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

U.S. TRUST CORPORATION,

Petitioner,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, FLORIDA DEPARTMENT OF BANKING AND FINANCE, CONFERENCE OF STATE BANK SUPERVISORS, FLORIDA BANKERS ASSOCIATION, and SUN BANK/PALM BEACH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY AND SUPPLEMENTAL BRIEF OF PETITIONER U.S. TRUST CORPORATION

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PARTIES TO THE PROCEEDING

The caption of the case in this Court lists all the parties to the proceeding.

Pursuant to Rule 28.1 of this Court, U.S. Trust Corporation represents that it has no parent companies or affiliates, and that its subsidiaries (except wholly owned subsidiaries) are Financial Technologies International, Inc., Saudi-U.S. Trust Company, Limited, and Foreign and Colonial Asset Management.

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Pursuant to Supreme Court Rule 22.5, Petitioner U.S. Trust Corporation ("U.S. Trust") respectfully submits this brief in reply to certain arguments made in opposition to the grant of certiorari in this case, by Respondent Board of Governors of the Federal Reserve System (the "Federal Reserve Board" or "Board") and by Respondents Florida Department of Banking and Finance, Florida Bankers Association, Sun Bank/Palm Beach, and Conference of State Bank Supervisors (the "Florida Respondents"). Pursuant to Supreme Court Rule 22.6, U.S. Trust also submits this Brief to call the Court's attention to the Tenth Circuit's recent decision in *Oklahoma Bankers Association v. Federal Reserve Board*, 766 F.2d 1446 (10th Cir. 1985).

I. U.S. TRUST'S CERTIORARI PETITION SHOULD BE GRANTED

In their responses to U.S. Trust's certiorari petition, the Respondents agree that the petition raises issues of considerable significance. However, they disagree as to the appropriate resolution of the petition. The United States (as amicus curiae) recommends an immediate grant of the petition. (Brief for the Respondent Federal Reserve Board and for the United States as Amicus Curiae at 9). The Federal Reserve Board would have the Court defer the petition until the Court has decided another case now before the Court—*Dimension Financial Corp. v. Board of Governors*, 744 F.2d 1042 (10th Cir. 1984), *cert. granted*, 105 S.Ct. 2137 (1985) ("*Dimension*"). (*Id.* at 7). The Florida Respondents suggest that the Court either deny the U.S. Trust petition or consider *U.S. Trust* and *Dimension* "in tandem." (Memorandum of Florida Respondents at 19). U.S. Trust submits that an immediate grant of its petition is appropriate and that the *U.S. Trust* case should be argued at the same time as *Dimension*.

A. Resolution of this Petition Should Not Be Deferred Until a Decision in the *Dimension* Case

While the *Dimension* case is obviously relevant, it cannot resolve the broader and more significant issues in *U.S. Trust*. The Federal Reserve Board nonetheless contends that the *U.S. Trust* case should be deferred because it "is very likely to be *affected* by this Court's decision in *Dimension*." (Brief for the Respondent Federal Reserve Board and for the United States as Amicus Curiae at 7; emphasis added). This argument is simply not an adequate basis for deferring U.S. Trust's petition. Indeed, the Court should consider the fundamental statutory issues in *U.S. Trust* before ruling on the more limited issue in *Dimension*.

U.S. Trust's certiorari petition raises a question of broad statutory construction—whether the Board can simply ignore an express element (*i.e.*, the "commercial loan" requirement)

of the statutory definition of "bank" adopted by Congress in the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841 *et seq.* (the "BHC Act").[1] The court below concluded that, to comply with what the court considered to be the underlying statutory policy of the Douglas Amendment to the BHC Act, the Board should have ignored the commercial loan test of the "bank" definition.

In contrast, the *Dimension* case assumes the validity of the commercial loan requirement and questions whether the Board can broaden the definition of "commercial loan" by regulation. The validity or invalidity of that regulation cannot resolve the question in *U.S. Trust*, whether the Board is required by the policy behind the Douglas Amendment to ignore the commercial loan language of the statute.

The Federal Reserve Board argues that both the *Dimension* case and the *U.S. Trust* case raise questions—albeit different ones—of the Board's authority under Section 5(b) of the BHC Act to prevent "evasions" of the Act.[2] (Brief for Respondent Federal Reserve Board and for United States as Amicus Curiae at 5). Specifically, the Board states that this case involves "a broad interpretation of the Board's authority . . . to prevent evasions of the Act, in contrast to the narrow construction of the same authority at issue in *Dimension*." (*Id.* at 7).

The Board's power under Section 5(b) is, however, merely a subsidiary issue in *U.S. Trust*. Section 5(b) is not at issue in *U.S. Trust*, unless the Court concludes that the commercial loan requirement in the "bank" definition should have been ignored. Otherwise, there is no possibility of "evasion" in *U.S. Trust* because U.S. Trust's Florida nonbank bank makes no commercial loans. Indeed, in the court below, the Board

1 Section 2(c) of the BHC Act, 12 U.S.C. § 1841(c), defines a "bank" to be any institution "which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans."

2 Section 5(b) of the BHC Act, 12 U.S.C. § 1844(b), authorizes the Board "to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of the Act and prevent evasions thereof."

argued that it would be *inappropriate* to treat the *U.S. Trust* case as an "evasion" under Section 5(b) because "U.S. Trust's subsidiary will not engage in any activity either directly or indirectly, that is the functional equivalent of commercial lending." (Brief for Respondent Board of Governors of the Federal Reserve System at 28 (11th Cir. Sept. 1984)).

The Board also contends that the *Dimension* and *U.S. Trust* cases both raise the possibility that, unless nonbank banks are prohibited, the owners of nonbank banks will be able to avoid any regulation as bank holding companies under the BHC Act. (Brief for Respondent Board and for the United States as Amicus Curiae at 5). This contention is not accurate. U.S. Trust is a registered bank holding company that operates in full compliance with the BHC Act. Indeed, in approving the expansion of the activities of U.S. Trust's Florida subsidiary, the Board determined that its approval would not give rise to any violations of the BHC Act. (Petition for Writ of Certiorari of U.S. Trust at 4, A23). Further, even if the Court upholds the regulation at issue in *Dimension*, Dimension Financial Corporation would not become a bank holding company if its nonbank banks do not make "commercial loans" as defined in that regulation.

B. This Case Should Be Considered With the *Dimension* Case

The Florida Respondents suggest that, if the U.S. Trust petition is not denied outright, the *U.S. Trust* case should be briefed, argued and decided "in tandem with *Dimension*." (*Id.* at 19). As noted above, U.S. Trust agrees that the arguments in *Dimension* and *U.S. Trust* should occur on the same date. The Court will be better able to resolve the broad, underlying issues of *U.S. Trust* and the related, specific issue of *Dimension*, if both cases are considered together.

II. THE DECISION BELOW CONFLICTS WITH THE TENTH CIRCUIT'S RECENT *OKLAHOMA BANKERS* DECISION

The Court of Appeals for the Tenth Circuit recently confirmed its *Dimension* opinion in *Oklahoma Bankers Association v. Federal Reserve Board*, 766 F.2d 1446 (10th Cir. 1985) ("*Oklahoma Bankers*"). The *Oklahoma Bankers* decision, which was unavailable when U.S. Trust filed its certiorari petition, conflicts with the Eleventh Circuit's decision below and presents an additional reason for the grant of U.S. Trust's petition.

In *Oklahoma Bankers*, the Tenth Circuit affirmed the Federal Reserve Board's approval of a New York bank holding company's purchase of an Oklahoma trust company. The bank holding company proposed that the trust company make consumer and commercial loans, and issue thrift certificates and thrift passbook certificates, but not take demand deposits. Finding that the thrift certificates "lacked the characteristics of a demand deposit as funds are not 'payable on demand to third parties,' " 766 F.2d at 1149, citing *First Bancorporation v. Board of Governors*, 728 F.2d 434 (10th Cir. 1984), the Board held that the certificates were not demand deposits. Because the trust company would not take demand deposits, the Board ruled that the trust company was to be a "limited function institution engaged in industrial bank activities" and approved the application.

The Tenth Circuit upheld the Board's determination that the thrift certificates in question were not demand deposits, rejecting the argument of Petitioner Oklahoma Bankers Association[3] that the Court should look to the trust company's theoretical powers under state law, and not to its powers as limited by the Board's approval. Criticizing these arguments as failing "to

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3 The Oklahoma Bankers Association has joined in the amici curiae brief submitted in *Dimension* by the Conference of State Bank Supervisors and the Florida Bankers Association, Respondents here.

reflect the amendments to the Act and their significance,'' the Tenth Circuit held:

> The Association asks this Court to retreat to a position Congress intentionally abandoned. We no longer look to the possible powers an institution may exercise under a state charter but rather decide whether it meets both the deposit and commercial lending elements of the statutory test.

766 F.2d at 1450 (citations omitted). The Tenth Circuit therefore affirmed its *Dimension* holding that ''[t]he Act itself with the clearly expressed definitions permit[s] the development of non-bank banks.'' 766 F.2d at 1449, citing *Dimension Financial Corp. v. Board of Governors*, 744 F.2d at 1404.

In *U.S. Trust*, the court below did exactly what the Tenth Circuit refused to do in *Oklahoma Bankers*. Adopting a position Congress intentionally abandoned in 1970, the Eleventh Circuit chose to ignore Congress's 1970 addition of the commercial loan requirement to the BHC Act's definition of ''bank.''

Thus, the Tenth Circuit's *Oklahoma Bankers* decision, like *Dimension*, conflicts with the Eleventh Circuit's *U.S. Trust* opinion. The Tenth Circuit clearly recognizes the validity of nonbank banks, ''institutions that [fall] within the non-bank exception molded by Congress.'' 766 F.2d at 1449, citing *Dimension*. This Court should therefore grant U.S. Trust's Petition and resolve this obvious conflict of law between the Tenth Circuit and the Eleventh Circuit.

Conclusion

For the reasons stated above, the Court should grant U.S. Trust Corporation's petition for a writ of certiorari.

Respectfully submitted,

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